86-463

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

Frank Fiorello, et al,

Petitioners,

vs.

Eaton Corporation, et al,

Respondents

PETITION FOR WRIT OF CERTIORARI
To The Sixth Circuit Court Of Appeals

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Cleveland, Ohio 44114
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50pp

QUESTIONS PRESENTED

Did the District Court err by failing to rule upon Petitioners' pending Motion under Fed.R.Civ.P. 56(F) before granting Respondents' Motion For Summary Judgment ?

PARTIES

PETITIONERS

Frank Fiorello

Dave Cooper

Norman T. Gray

Tony Laddis

Arthur S. Swaney

RESPONDENTS

Eaton Corporation

Mechanics Educational Society of America

International Union of the Mechanical Educational Society of America

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OPINIONS BELOW

On March 31, 1986, The United States Court of Appeals for the Sixth Circuit, Case No. 85-3266, affirmed the Memorandum and Order of the United States District Court, Northern District of Ohio, Eastern Division, Case No. C84-853. rendered on January 31, 1985. Both Decisions are unreported, but copies are contained in the Appendix.

JURISDICTION

Jurisdiction for the filing of this Petition is conferred by 18 U.S.C. §2101(C).

The Judgment sought to be reviewed was filed on March 31, 1986.

PROVISIONS INVOLVED

This case involves the following Constitutional provisions, statutes and Rules:

> ***When Affidavits are Unavailable.*** *Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.*
> *Fed.R.Civ.P. 56(F)*

STATEMENT OF CASE

This is a labor law case arising out of the closing of Respondent, EATON CORPORATION's, Axle Division in Cleveland, Ohio. The five (5) named Petitioners represent a class of laid-off employees suing their former employer and their Unions for breach of a Collective Bargaining Agreement and breach of the duty of fair representation, respectively.

The Petitioners filed their Complaint on March 12, 1984. The Unions and Eaton answered on April 27, 1984 and May 7, 1984, respectively.

On June 8, 1985, the Respondent, UNIONS, moved for Summary Judgment. On September 15, 1984, the Respondent, EATON, filed a Brief in Support of that Motion and prayed that discovery be stayed pending a ruling on the Summary

Judgment. The Respondent, UNIONS, filed a Supplemental Motion for Summary Judgment on September 17, 1984.

On October 30, 1984, in response to the pending Summary Judgment Motions, Petitioners filed a Motion under Rule 56(F) with a Brief and Affidavit attached. Petitioners noted that additional discovery was needed to properly formulate a response to the pending Summary Judgment Motions. In the alternative, Petitioners asked for sixty (60) days from an adverse ruling on their request in which to attempt to respond to the merits of the Summary Judgment Motions.

On January 31, 1985, before ruling upon Petitioners' pending Motion under Rule 56(F), the District Court granted the Respondent UNIONS', Motion for Summary Judgment.

It was not until Petitioners filed a Motion to Alter or Amend that the District Court addressed Petitioners' Motion under Rule 56(F). The District Court "den[ied] the ... Rule 56(F) Motion nunc pro tunc with the ruling of their request for extension of discovery cut-off" on November 7, 1984.

On March 8, 1985, the District Court issued a Memorandum and Order denying Petitioners' Motion to Alter or Amend. Petitioners timely filed a Notice of Appeal on March 29, 1985.

On March 31, 1986, the United States Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court.

JURISDICTION OF COURT OF FIRST INSTANCE

The jurisdiction of the Court of first instance was invoked under 29 U.S.C. §185.

ARGUMENT

THE DISTRICT COURT ERRED BY FAILING TO RULE UPON PETITIONERS' PENDING MOTION UNDER CIVIL RULE 56(F) BEFORE GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT; THEREBY PRECLUDING PETITIONERS FROM RESPONDING TO THE MERITS OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

Granting Summary Judgment was an inappropriate response to a Rule 56(F) Motion. The clear language of Rule 56(F) provides for three (3) possible responses to such a Motion. The Court may: "1) refuse the application for Judgment; or 2) may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had; or 3) may make such order as is just". Fed.R.Civ.P. 56(F). Granting Summary Judgment is not an alternative and doing so without ruling on Petitioners' 56(F) Motion has the effect of preventing the Petitioners from asserting their opposition to said Motion.

A Motion under Civil Rule 56(F) was a proper response to Respondents' Motion For Summary Judgment. A Motion under Civil Rule 56(F) places the Court on notice that a party cannot "present by affidavits facts essential to justify his opposition ..." to Summary Judgment. Fed.R.Civ.P. 56(F). The Petitioners in the case at bar filed a Brief and the required affidavit attached to their Motion under Rule 56(F). The Petitioners clearly set forth their inability to respond to the merits of Summary Judgment. The District Court erred in ignoring this proper response to Summary Judgment.

Before ruling on Petitioners' Motion under Rule 56(F), the District Court granted Respondents' Motion for Summary Judgment. The Court stated that "[t]he time for filing a timely response has expired, and the employees have so

far failed to oppose the Motion." Memorandum and Order. *This statement is inaccurate. Petitioners filed a timely response to the Motion for Summary Judgment by way of its Motion under Rule 56(F). They should have not been required to respond further, pending a ruling on the 56(F) Motion.*

On page 6 of its Order granting Summary Judgment, the District Court quoted this Honorable Court in Adickes v. S.H. Kress Co., *398 U.S. 144 (1970), "It has always been perilous for the opposing party neither to proffer any countering evidentiary material* nor *file a 56(F) affidavit."* Id., *at 161. (emphasis added). This quotation indicates that the possible responses to a Motion for Summary Judgment are: 1) the peril of no response at all; 2) proffering evidentiary material; or 3) a Rule 56(F) response.*

Petitioners in this case did not expose themselves to the peril warned in Adikes, supra. Petitioners indicated, by way of their Rule 56(F) Motion, that they were unable to respond to the merits of Summary Judgment. They filed a Rule 56(F) Motion on October 30, 1984, seeking further discovery. In the alternative, they requested sixty (60) days from an adverse ruling on the 56(F) Motion to respond directly to the Summary Judgment.

It was not until the Petitioners filed a Motion to Alter or Amend the Summary Judgment that the District Court took notice of the outstanding Motion under Rule 56(F). The Court "den[ied] the employees' Rule 56(F) Motion nunc pro tunc with the ruling on their request for extension of discovery cut-off". Memorandum and Order.

The Federal Rules of Civil Procedure and public policy preclude the denial of Petitioners' Rule 56(F) Motion, nunc pro tunc. Fed.R.Civ.P. 79(A) requires the Clerk to maintain the docket where all orders of the Court will appear. It has always been hornbook law that a Court speaks through its Journal. See Petition of Inquiry into Certain Practices, 150 Ohio St. 393, 83 N.E.2d 58 (1949); Krasny v. Metropolitan Life Insurance Co., 143 Ohio St. 284, 54 N.E.2d 952 (1944). The District Court speaks through its docket. The need for accuracy in this docket is evidenced by the manner in which the docket controls the timing of various important acts. See, e.g., Fed.R.Civ.P. 59 and 60.

In the case at bar, the docket shows a separate "Motion of Plaintiffs' under Rule 56(F) with Brief annexed filed" on October 30, 1984. The next Court Order on the docket was an "Order denying Motion of Plaintiffs for an extension of discovery cut-off". The docket does not reflect a ruling on Petitioners' Motion under Rule 56(F) before the entry of Summary Judgment. Petitioners never had notice of a ruling on that Motion.

The Petitioners were not on notice that the District Court's denying an extension of discovery cut-off on November 7, 1984 impliedly denied Petitioners' Motion under Rule 56(F). The discovery which would be allowed under Rule 56(F) is narrower than full discovery under Civil Rule 26(B). See, First National Bank v. Cities Service, 391 U.S. 253 (1968).

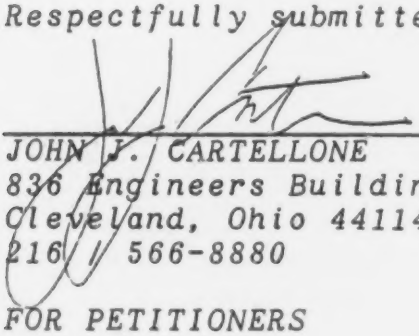
It cannot be argued that the Court's denial of full discovery under Rule 26(B) was also a denial of this narrower discovery sought by Petitioners to adequately respond to the pending Summary Judgment Motion.

The District Court's purported denial of Petitioners' Motion for additional discovery, nunc pro tunc, poses an extreme hardship on these Petitioners with meritorious claims. By filing a Rule 56(F) Motion, Petitioners indicated difficulty in responding to the Motion for Summary Judgment. Petitioners held any possible response they could make to the merits of Summary Judgment in abeyance pending a ruling on their 56(F) Motion. Instead of ruling on that Motion, the District Court granted Respondent, UNIONS', Motion for Summary Judgment.

In this ruling, the District Court clearly erred.

It is respectfully requested that this Petition for Certiorari be granted.

Respectfully submitted,



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COUNSEL FOR PETITIONERS

NO. 85-3266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK FIORELLA, DAVID COOPER, NORMAN T. GRAY TROY LADDIS, ARTHUR R. SWANEY, on their own behalf, and on behalf of a class of former Eaton Corporation employees who are similarly situated,	*	
Plaintiffs-Appellants	*	
v.	*	
EATON CORPORATION; MECHANICS EDUCATION SOCIETY OF AMERICA, UNION LOCAL No. 21; INTERNATIONAL UNION OF MECHANICAL EDUCATION SOCIETY OF AMERICA,	*	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
Defendants-Appellees	*	

* * *

Decided and Filed _____

BEFORE: MARTIN and KRUPANSKY, Circuit Judges; and CHURCHILL, District Judge*

*Hon. James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Plaintiffs/appellants Frank Fiorello, Dale Cooper, Norman T. Gray, Tony Laddis and Arthur R. Swaney (plaintiffs) appealed the summary judgment in favor of the defendants Eaton Corporation (Eaton), Mechanic's Education Society of America, Union Local #21, and Mechanics Education Society of America, AFL-CIO, (the unions) in this hybrid §301 action for breach of a collective bargaining agreement and unfair representation.

Plaintiffs were employed by Eaton Corporation (Eaton) at its Cleveland Ohio axle plant and were also members of the defendant unions. Plaintiffs were laid off in early 1984 pursuant to the terms and conditions of two collective bargaining agreements negotiated in 1976 and 1979, each of which incorporated a "relocation clause" which permitted

layoffs of employees if necessitated by the relocation of Eaton's facility.

Between June 25, 1981 and February 22, 1984, plaintiffs initiated and pursued a series of grievances against Eaton which were all processed by the unions through the procedures then in effect pursuant to a January, 1982, amendment to the collective bargaining agreements between Eaton and the unions.

On March 12, 1984, plaintiffs commenced this action against Eaton and the unions alleged breach of the collective bargaining agreements and breach of the duty of fair representation pursuant to §301(a) of the Labor Management Relations Act of 1947 (as amended), 29 U.S.C. 185(a). The plaintiffs charged improper representation by the unions, conspiracy with Eaton to violate the relocation of

work clause of the existing collective bargaining agreements, the unions' failure to monitor the relocation of work, failure of the union to protect existing rights of the plaintiffs and circulating misleading summaries to members of the union of Eaton's economic condition. The defendant Eaton and the unions answered on April 27 and May 27, 1984. On June 18, 1984, three months after the complaint had been filed, the unions moved for summary judgment. The motion was fully supported by affidavits and other documentary evidence as well as a memorandum of law. Thereafter plaintiffs moved for three consecutive leaves to plead to the unions' motion for summary judgment. On September 5, 1984, Eaton filed a memorandum of law supporting the unions' motion for summary judgment, together with a motion

to stay discovery pending disposition of the motion for summary judgment. On September 17 1984, the unions filed a supplememtal motion for summary judgment alleging the failure of the plaintiffs to state a claim upon which relief could be granted. Plaintiffs requested and were granted an additional leave to plead.

On October 23, 1984, the district court granted Eaton's motion to stay discovery noting that the time for discovery had expired on September 12, 1984, and plaintiffs had failed to timely request an extension to further pursue discovery. It should be noted that during the intervening eight months, plaintiffs had not commenced or pursued discovery in any form beyond a limited number of interrogatories directed to Eaton.

Shortly before 4:00 P.M. on the afternoon of October 30, 1984, the date upon which plaintiffs' fourth extension to pursue discovery expired, they filed a Federal Rule of Civil Procedure 56(f) motion. In their motion, plaintiffs requested four additional months to conduct limited discovery or, in the alternative, an extension of two months within which to respond to the unions' summary judgment motions. On October 31, plaintiffs moved for an additional six-month extension to conduct full discovery pursuant to Federal Rule of Civil Procedure 26(b). Both motions elicited timely responses by the defendants. On November 7, 1984, the district court denied plaintifs' motion for extended discovery.

Thereafter, plaintiffs did nothing to pursue their causes of action. On

January 31, 1985, over two months after plaintiffs had filed their last pleadings, the district court granted the unions' motion for summary judgment, which also inured to the benefit of Eaton,[1] concluding that the evidence then before the court disclosed that the unions had acted in accordance with all grievance procedures and the record was devoid of any conflicting material facts to reflect that the unions acted

---

1. In a §301(a) action, an employee has the dual burden of establishing both the union's breach of the duty of fair representation and a breach of the collective bargaining agreement by his employer. Vaca v. Sipes, 386 U.S. 171, 198, 87 S.Ct. 903, 915 (1967). Both elements must be proved before an employee is entitled to relief under §301(a). Findley v. Jones Motor Freight, 639 F.2d 953, 958. In the case at bar, the failure of plaintiff to support charges of the union's breach of duty of fair representation was also fatal to its cause of action against Eaton.

arbitrarily or in bad faith. Moreover, the court also observed that the plaintiffs' charges, anchored in alleged wrongful conduct by the unions, during the negotiation of the 1982 collective bargaining agreement, occurred more than two years prior to the date of the commencement of the instant action and was therefore barred by the six-month statute of limitations applicable to §301 actions against the unions. The court alternatively dismissed the action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

On February 6, 1985, plaintiffs filed a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e), together with a 56(f) motion charging error in granting summary judgment. The trial court overruled both motions.

This court has reviewed the decision of the trial court, the assignments of error, the record in its entirety as presented, and the briefs and oral arguments of counsel and concludes that the judgment of the district court should be AFFIRMED for the reasons articulated in the well-reasoned opinion of Judge Aldrich.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK FIORELLO, et al	*	CIVIL ACTION
	*	NO. C84-853
Plaintiffs	*	
	*	
vs.	*	
	*	
EATON CORPORATION, et al	*	**MEMORANDUM**
	*	**AND ORDER**
Defendants	*	

ALDRICH, J.

This is a labor dispute arising from the closing of the Eaton Corporation's Axle Division Cleveland Plant. The plaintiffs, five former Eaton employees who claim to represent a class of laid off Eaton employees, are suing their former employer and their unions for breach of the collective bargaining agreement and breach of the duty of fair represenation. Pending before the Court is the defendant

unions' unopposed motion for summary judgment. Upon consideration, the motion is granted.

Jurisdiction is proper pursuant to §301(a) of the Labor Management Relations Act of 1947 (as amended), 29 U.S.C. §185(a).

Plaintiffs Dale Cooper, Frank Fiorello, Norman T. Gray, Tony Laddis, and Arthur R. Swaney ("the employees"), who were laid off by Eaton in 1978 and 1979, are former members of defendants Mechanics Educational Society of America, Local No. 21 and Mechanics Educational Society of America, AFL-CIO, (the "unions). The lay-offs occurred pursuant to the terms of two collective bargaining agareements, one negotiated in 1976, the other in 1979. Both agreements included a relocation clause which provided that separation pay would

be given to certain laid-off Eaton employees if Eaton relocated all or a major part of its operations within 5 years from the date of the employees' lay-off.

The relocation clauses in the 1976 and 1979 agreements are identical. They provide:

RELOCATION CLAUSE

> Eaton intends to maintain axle manufacturing facilities at 739 East 140th Street, Cleveland, as long as they can be competitive. If, subsequent to this date of Agreement, competition necessitates the movement of all or a major part of its operations to another plant, the employees who are laid off as a result of such a move and who elect to move to the new location will be given preference for available jobs at the new location, provided that they make application for such jobs prior to the start of operations at the new location. The Company will inform the Union of its intent to make such a move ninety (90) days in advance.

> *Employees with 3 or more years' seniority who are laid off within 5 years because of the move described above, are not transferred to the new location, and are not recalled within 1 year of their layoff date, will be eligible to receive a separation payment equivalent to $300 times their years of seniority provided: (a) they make application for the payment and waive all employment and seniority rights, and (b) they are not eligible for any retirement benefit other than a vested retirement benefit.*

This suit arises over Eaton's denial of separation pay to the employees. Under the relocation clauses in the collective bargaining agreements in effect at the time of their layoffs, the employees allege that they are entitled to separation pay because, they allege, Eaton's 1983 closing of its axle manufacturing facilities in Cleveland was caused by Eaton's systematic relation of work from the plant to other locations around the world. The

employees also allege that Eaton breached the agreements by failing to notify the union that work was being relocated, as required by the agreements. They further allege that the unions breached their duty of fair representation by negotiating the 1982 agreement with Eaton, in effect at the time of the plant shut-down, which excluded them, and other enployees who were on layoff status as of February 1, 1982, from eligibility for separation pay in the event of a relocation.

The relocation clause in the February 1st, 1982 Collective Bargaining Agreement reads as follows:

> 87. Relocation Clause. Eaton intends to maintain axle manufacturing facilities at 739 East 140th Street, Cleveland, as long as they can be competitive. If, subsequent to this date of Agreement, competition necessitates the movement of all or a part of its operations to

another plant that affects 10% of the work force, the employees who are laid off as a result of such a move and who elect to move to that location will be given preference for available jobs at that location, provided that they make application for such jobs prior to the start of operations at that location. The Company will inform the Union of its intent to make such move ninety (90) days in advance.

Employees who are laid off within five (5) years because of the move described above, are not transferred to that location, and are not recalled within one (1) year of their layoff date, will be eligible to receive a separation payment, provided they make application for the payment and waive all employment and seniority rights, in accordance with the following schedule:

A. Employees on the active payroll (active payroll defined as the current seniority roster of working employees, inclusive of those employees on an approved leave of absence but exclusive of those employees on layoff status) on February 1, 1982, or who become active during this Agreement, and who are not eligible to retire prior to November 1, 1985, and receive

> *a pension benefit under the Pension Plan, will be paid a separation payment of $500.00 per full year of seniority at date of layoff.*
>
> *B. Employees on the active payroll on February 1, 1982, or who become active during this Agreement, and who are eligible to retire prior to November 1, 1985, and receive a pension benefit under the Pension Plan, will be paid a separation payment of $100.00 per full year of seniority at date of layoff.*

Defendant unions move for summary judgment on the grounds that the employees' complaint fails to state a cause of action, that they have failed to exhaust the grievance procedure, and that the statute of limitations bars all allegations that the union negotiated improperly. This Court granted the employees four extensions of time to respond to the unions' motion. The time for filing a timely response has expired, and the employees have, so far, failed to oppose the motion.

II.

The employees' failure to file a timely response to the unions' motions as required by Fed.R.Civ.P. 56(e)[1] and L.Civ.R. 3.01[2] is reason enough to dismiss their claims for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).[3]

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1. Under Fed.R.Civ.P. 56(e), the party against whom summary judgment is sought "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him."

2. L.Civ.R. 3.01(3) provides that "[e]ach party opposing the motion shall serve and file within ten (10) days thereafter a brief written statement of reasons in opposition to the motion and a list of the authorities on which he relies."

3. Fed.R.Civ.P. 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him ....

Interpreting this text, the Supreme Court has concluded that district courts retain the "inherent power" to dismiss actions or claims sua sponte. Link v. Wabash Railroad Co., 370 U.S. 626 (1962). "It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition." Id., at 629. See, 9 C. Wright, A. Miller & F. Elliott, Federal Practice and Procedure: Civil §2370 (1971 & Supp. 1984).

III.

A.

Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The burden of showing the absence of any genuine dispute over relevant facts is on the party seeking summary judgment. Adickes v. S.H. Kress & Co., 390 U.S. 144, 157 (1970). When considering a motion for summary judgment, the Court must view the material presented by the moving party in the light most favorable to the party opposing summary judgment. Id. The employees' failure to respond to the unions' motion does not ease the unions' burden, but it does present this Court with an uncontroverted factual record.

> *It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit. And the peril rightly continues. Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment.*

Adickes v. S.H. Kress & Co., *398 U.S. at 161 (quoting 6 J. Moore Federal Practice ¶56.22 [2], pp. 2824-2825 (2d ed. 1966)).*

The unions submitted substantial documentary evidence, including an affidavit in compliance with Fed.R.Civ.P. 56(f), copies of union memoranda concerning the collective bargaining agreements, copies of grievances, and correspondence regarding disposition of the grievances. Review of this documentary evidence reveals that there is no genuine issue of

material fact that would preclude summary judgment in this case.

B.

To prevail in an action under §301 against either the employer or the union, an employee must ordinarily show both that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement. Clayton v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, 451 U.S. 679, 683 n. 4 (1981). The union's statutory duty of fair representation is breached only when a union's actions concerning a member of the collective bargaining unit are "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967). In §301 actions, the

Sixth Circuit has defined "arbitrary treatment" as "unexplained union inaction which substantially prejudices a member's grievance ..." Ruzicka v. General Motors Corp., 649 F.2d 1207, 1211 (6th Cir. 1981).

1. With respect to the employees' claim that the unions did not properly represent them in their attempts to obtain severance pay under the relocation clause following their layoffs, the unions' uncontroverted documentary evidence indicates that they processed grievances in both 1981 and 1983. The 1981 grievance was filed in the names of plaintiffs Cooper and Laddis and covered all employees laid off in 1979. The 1983 grievance was also filed by Cooper and Laddis and similarly covered all employees seeking

severance pay under the relocation clause. Both grievances, numbered 5152 and 5203, respectively, were processed through the third step of the grievance procedure and were denied by the company. The contracts did not provide for arbitration and the union chose not to strike. The employees have not disputed the unions' recitation of the facts and circumstances which led it to conclude that a strike would be ineffective in obtaining a favorable resolution of the grievances. The unions did not strike because Eaton had laid off approximately half the plant employees, locked the workers out during contract negotiations, and reopened contract talks in order to obtain economic concessions before the collective bargaining agreement expired. All the documentary evidence presented

by the union indicates that it acted in accordance with the grievance procedures. The employees have presented no proof that the unions acted arbitrarily or in bad faith, nor have the employees presented any evidence whatsoever which would even raise a question of fact with respect to whether the unions carried out their duty to fairly represent the employees. Such proof is necessary to establish a breach of the duty of fair representation under §301. Vaca v. Sipes, 386 U.S. at 190. The unions' documents indicate it used the procedures available for challenging Eaton's decision to deny separation pay to the employees. A union demonstrates good faith when it utilizes the available opportunities to present a grievance. Findley v. Jones Motor Freight, 639 F.2d 953, 961 (3d Cir.

1981). Even if the unions had exercised poor judgment when they decided not take the separation pay issue to a strike, the employees would still not have a supportable unfair representation claim. See, Bazarte v. United Transportation Union, 429 F2d 868, 872 (3rd Cir. 1970). An unfair representation claim requires a showing that the Union has been guilty of fraud, misrepresentation, dishonesty of purpose or bad faith, or that it acted arbitrarily or in bad faith. Bower v. Ken-Tool Manfacturing Co., No. C81-1346A (N.D. Ohio, Aug. 26, 1981), Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970).

The unions' argument that the employees have failed to exhaust the grievance procedure with respect to their claims for separation pay under the supplemental agreement to the 1982

collective bargaining agreement (the "Effects Agreement") are no longer applicable. The grievance procedure was exhausted after the unions attempted to take their dispute with Eaton under the Effects Agreement to arbitration. The unions' attempt to compel arbitration was unsuccessful and the grievance procedure has now been exhausted. With respect to any claims the employees may have arising from resolution of this attempt to obtain separation pay, the claims must likewise fail for lack of any showing that the unions acted arbitrarily or in bad faith. Vaca, 386 U.S. at 190; Findley, 639 F.2d at 961; Dill, 430 F.2d at 238.

2. The employees also claim that the unions breached their duty of fair repreentation when they negotiated the

1982 collective bargaining agreement containing a change in the relocation clause which excluded the employees from eligibility for separation pay. This claim is barred by the six month statute of limitations applicable to §301 actions against unions. Delcostello v. Teamsters, ___ U.S. ___, 103 S.Ct. 2281 (1983). The six month statute of limitations contained in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) adopted by Delcostello applies retroactively to cased pending in the Sixth Circuit. Jones v. Truck Drivers Local Union No. 299, ___ F.2d ___, No. C83-1201 (6th Cir. Nov. 29, 1984), Smith v. General Motors, 747 F.2d 372 (6th Cir. 1984) (en banc). The instant suit was commenced after the Delcostello decision. The alleged wrongful conduct by the union occurred during

negotiations more than two years prior to the date this action was filed. The uncontroverted affidavit of a union official submitted by the unions in support of their motion for summary judgment indicates that the employees have never filed a grievance relating to this claim nor have they taken any other action which would toll the running of the statute of limitations. Clearly the claims are barred by the six month statute of limitations and the federal labor policy which favors speedy resolution of labor disputes. Delcostello, 103 S.Ct. at 2291.

III.

An employee proceeding under §301 has the double burden of establishing both a breach of the duty of fair representation, is fatal to a §301

hybrid action. Findley v. Jones Motor Freight, 639 F.2d at 958. Having concluded that the unions are entitled to summary judgment as a matter of law, and that the employees' claims are subject to dismissal as well for failure to prosecute pursuant to Fed.R.Civ.P. 41(b), this Court finds that the employees cannot prevail in their §301 claims against Eaton. Consequently, the employees' claims against Eaton are also dismissed.

The complaint is dismissed.

IT IS SO ORDERED.

s/
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OF SERVICE

JOHN J. CARTELLONE, being first duly sworn upon oath according to law deposes and states that three copies of the foregoing PETITION FOR CERTIORARI have been served this 19th day of September, 1986 by causing same to be mailed first class mail, postage prepaid, upon the following:

Stuart O.H. Merz, Esq.
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and

Thurlow Smoot, Esq.
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SUBSCRIBED AND SWORN TO BEFORE me on this 19th day of September, 1986.

NOTARY PUBLIC
RITA D. CIOFANI
Notary Public, State of Ohio
My Commission has no expiration date.
§147.03 R.C.